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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., PETITIONER

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions, and opinion of the District Court (R. 159-174) are not reported. The opinion of the Court of Appeals (R. 182-195) is reported in 173 F. 2d 57.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1949 (R. 200). A petition

for rehearing was denied on March 26, 1949 (R. 210-211). The petition for a writ of certiorari was filed on July 19, 1949, within the period allowed by the order extending the time for the filing of the petition for certiorari (R. 212). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether in the administration of a milk marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, a tentative interpretation by the Market Administrator, referring only to one of several essential elements of classification, estops and binds the Secretary of Agriculture with respect to the classification of milk under the order, where (a) the interpretation was reversed by the Market Administrator prior to the end of the period for which the petitioner asserts the accrual of its claims and (b) the handling transactions in the petitioner's claims do not comply with the other requirements for the classification contended for by it.

(2) Whether the case should be remanded for further hearing with respect to petitioner's claims under a part of the stipulation between the parties which set forth an erroneous legal conclusion and was, therefore, not binding on the courts, where the part of the stipulation which was rejected deals with only one of the essential elements of classifica-

tion and the handling transactions in the petitioner's claims do not comply with the other requirements for the classification contended for by the petitioner.

(3) Whether the action of the Market Administrator in reclassifying milk in 1939 and 1940, under certain regulatory provisions that have not been in effect since May 1, 1940, came within the limits of the order then in effect.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended.

The order involved is Federal Order No. 27, regulating the handling of milk in the New York metropolitan marketing area. It was issued on August 5, 1938, effective September 1, 1938 (R. 79; 3 F.R. 1945, 1957, 2100, 2102; 7 CFR, 1938 Supp., 927). It was suspended (4 F.R. 1259, 2377) during the period January 31, 1939, to July 1, 1939.[1] The order is now in effect as amended and reissued with amendments from time to time (7 CFR, 927.1), but the provisions of the order relied on by the petitioner have not been in effect since the amendments of May 1, 1940 (7 CFR, 1940

[1] The suspension was in connection with the litigation which culminated in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

Supp., 927.1). The order is printed in the record (R. 79) and its pertinent parts are quoted or summarized in this brief.

Article III of Federal Order No. 27 (R. 79, 85-87; 7 CFR, 1938 Supp., 927.4) establishes nine classifications of milk.[2] The milk is classified in accordance with its utilization at, or movement from, the plant at which the milk is received from producers, except (1) if the milk is moved as milk from any plant outside the marketing area to a second plant outside the marketing area, the classification of such milk at the first plant may be in accordance with its utilization at the second plant, and (2) if the milk is moved as cream, plain condensed milk, or homogenized mixtures from any plant outside the marketing area to any second plant, the classification of such milk at the first plant may be in accordance with its utilization at the second plant.[3] The method of determining the uniform price and the operation of the producer-settlement fund or equalization pool are described in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, sustaining the validity of the Act and the order.

STATEMENT

The petitioner, a handler of milk subject to Federal Order No. 27, reported certain handling trans-

[2] The pertinent provisions of the order are set forth in the Appendix, *infra*, pp. 21-22.

[3] The classification scheme is on the basis of plant movement rather than ultimate utilization. *Queensboro Farm Products, Inc.* v. *Wickard* (C.A. 2), 137 F. 2d 969; and *Waddington Milk Co.* v. *Wickard* (C.A. 2), 140 F. 2d 97.

actions in cream as being in Class III-D during the periods October 1, 1938, to February 1, 1939, and July 1, 1939, to April 30, 1940. It is stipulated (R. 63-64) that the Market Administrator reclassified the petitioner's cream, in these transactions, from Class III-D—the class contended for by the petitioner—to Class II-A. The petitioner had received certain credits in the operation of the producer-settlement fund, during each of the months, as a result of reporting the cream as being in Class III-D; and upon reclassification by the Market Administrator, demand was made by the Market Administrator for the payment of a sum equal to such credits. It is stipulated (R. 63-64) that the petitioner "paid under protest" $157,060.63 to the Market Administrator,[4] and then instituted this proceeding for the recovery of the sum alleged to have been illegally exacted.

This proceeding was initiated by the filing of a petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(A)), requesting the Secretary of Agriculture to hold a hearing, on the claims of the petitioner, and to reverse the action of the Market Administrator in reclassifying the cream from Class III-D to Class II-A and to direct the Market Administrator to repay to the petitioner the sum claimed to have been illegally exacted. This section of the Act provides for a hearing on

[4] It is alleged by the petitioner (R. 12) that "approximately $145,000 was an illegal exaction."

any petition filed by a handler with respect to an order or obligation thereunder which the handler asserts is "not in accordance with law." *United States* v. *Ruzicka*, 329 U.S. 287. The ruling of the Judicial Officer[5] on the petition is "final, if in accordance with law" (7 U.S.C. 608c(15)(A)). Jurisdiction is conferred on the district courts to review a ruling of the Judicial Officer upon the institution of such action by the handler.

The petitioner contends that all of the handling transactions in its claims are within Class III-D. The petitioner relies on a tentative interpretation by the Market Administrator—subsequently reversed by the Market Administrator several months prior to the end of the period for which the petitioner asserts the accrual of all of its claims—as to the meaning of the phrase "not a handler" in the definition of Class III-D, and also relies, in connection with two of its five claims, on the part of a stipulation which, as petitioner alleges, paraphrases the original or tentative interpretation by the Market Administrator. The detailed facts relating to the various claims are set forth in the Argument *infra*. Both the District Court and the

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[5] The Judicial Officer acted for the Secretary of Agriculture of the United States pursuant to the authority delegated (10 F.R. 13769) under the Act of April 4, 1940, 54 Stat. 81, 5 U.S.C. 516a *et seq.*, which provides (Sec. 3) that whenever a delegation is made under the statute, "all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture."

Court of Appeals (in an opinion by Chief Judge Learned Hand) affirmed the ruling of the Judicial Officer denying the petitioner's claims. They held that the handling transactions do not comply with the III-D classification in the order; that the original interpretation was inconsistent with the terms of the order and therefore erroneous; and that since the stipulation set forth an erroneous legal conclusion, it was not binding on the courts in this respect.

ARGUMENT

The controversy here centers on the question—the importance of which does not extend beyond this case—whether the petitioner's handling transactions in cream were within Class III-D. All milk received from producers is classified in accordance with its utilization at, or movement from, the plant where it is received from producers, subject to two exceptions to which the petitioner's claims relate: (1) if milk is moved as milk from any plant outside the marketing area where it was received from producers to a second plant outside the marketing area, the classification of such milk at the first plant may be in accordance with its utilization at the second plant; and (2) if milk is moved as cream from any plant outside the marketing area to any second plant, the classification of such milk at the first plant may be in accordance with its utilization at the second plant. On the basis of these exceptions, the petitioner contends that the handling transactions in cream, included

in its claims, should be classified as III-D. That classification includes any transaction in which there was (1) a sale and delivery of cream to a purchaser, (2) the purchaser was "not a handler," and (3) the delivery of the cream was "outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area."

The tentative interpretation, relied on by the petitioner, and the part of the stipulation between the parties, discussed below, which set forth an erroneous legal conclusion relate only to one of the criteria for III-D classification, i.e., the requirement that the cream be delivered to a purchaser who is "not a handler." In denying petitioner's claims, the lower courts applied settled principles of statutory construction and judicial review, and the rulings below seem plainly correct. Moreover, as pointed out below, the handling transactions in the petitioner's claims do not comply with another essential element for that classification. The petition therefore presents no question which warrants further review by this Court.

I

The various handling transactions for which Class III-D is claimed by the petitioner are in five groups, characterized by the petitioner as Claims 1, 2, and (A), (B), and (C) under Claims 3 and 4.

The lower courts denied Claim No. 1 because the cream was delivered to a plant in a county in which there was a plant approved by the health authorities for receiving milk to be sold in the marketing area.[6] The classification plan is on the basis of plant movement rather than ultimate utilization (*Queensboro Farm Products, Inc.* v. *Wickard* 137 F. 2d 969 (C.A. 2), and *Waddington Milk Co.* v. *Wickard,* 140 F. 2d 97 (C.A. 2), and as the opinion of the court below observes (R. 187):

> All we need hold as to Claim One is that when a "purchaser" receives cream in an "unapproved county" and takes it at once to a "plant" in an "approved county," his status as "handler" of that milk is to be determined by the location of that "plant."

The tentative interpretation by the Market Administrator as to the meaning of the phrase "not

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[6] Alternative grounds were considered. E.g., because the appellate court considered the question "a vexing one," the petitioner's argument was accepted, for the purposes of the appeal (R. 185-186), that "utilization" at the second plant, under the exceptions in Article III, section 1 of the order (R. 85-86; and Appendix, *infra*, p. 21) has a meaning as broad as the general rule of classification on the basis of "utilization at, or movement from, the plant" at which the milk was received from producers. If the petitioner's argument in this respect is rejected, the only basis for the III-D classification at the second plant, under the definition of Class III-D (R. 87; and Appendix, *infra*, p. 22), would be in the event the cream is there manufactured into cream cheese. The graphic charts (R. 196-199) that are appended to the opinion of the Court of Appeals are useful in tracing the shipments through the various plants. After considering the claim on the hypotheses urged by the petitioner, it was decided that the claim is without merit under the III-D requirements.

a handler" in the definition of Class III-D is not, therefore, the basis for disposition of this claim with respect to cream which the petitioner sold, under the terms of its agreement, "subject to reclassification by the Market Administrator" (R. 47). Also the erroneous legal conclusion in the stipulation refers only to Claim No. 2 and (A) under Claims 3 and 4.

II

The petitioner's Claim No. 2 is with respect to cream which the petitioner shipped from its plants in Horseheads, New York, and Mansfield, Pennsylvania, to the petitioner's plant in Newark, New Jersey (R. 68). The shipment of the cream was by the petitioner to the petitioner. There was not, therefore, a sale and delivery of the cream to a "purchaser," as required for classification in Class III-D.

Assuming, *arguendo,* a sale and delivery of the cream to a purchaser, the question arises as to whether the purchaser was a handler.[7] It is admitted (R. 62) that the petitioner was a handler, and operated as a handler during all of the periods involved in this case. It was as a handler that this proceeding was instituted, under the statute, by the petitioner. Compare *Stark* v. *Wickard,* 321

[7] This is either on the basis that the shipment by the petitioner to the petitioner was a delivery to a purchaser or on the petitioner's hypothesis that classification may be had on the basis of "movement from" the second plant under the exception in Article III, section 1 of the order, *infra,* p. 21.

U.S. 288, with *United States* v. *Ruzicka,* 329 U.S. 287. But the stipulation erroneously stated (R. 68), with respect to Claim No. 2, that this delivery of cream by the petitioner to the petitioner "was not a receipt or purchase by a handler." The shipment by the petitioner to the petitioner involved no delivery to a purchaser at all, but the petitioner's contention is that this part of the stipulation states or connotes that the delivery was to a non-handler, and is alleged to be merely a restatement of an interpretation (R. 131) by the Market Administrator that the phrase "not a handler," in the definition of Class III-D, means that when "a plant is not approved for the marketing area the dealer is not considered a handler at that plant," even though the dealer may have other approved plants. The petitioner's plant to which the cream was shipped by the petitioner was not approved for receiving milk to be sold in the marketing area, and the County had no approved plant. By definition in the order (R. 83; 7 CFR, 1938 Supp., 927.2(f)) a handler is any person who engages in the handling of milk or cream "which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area * * *."

To be entitled to III-D classification the cream must be delivered to a purchaser in a county (outside of New York) *without* a plant approved by the health authorities for the receiving of milk to be sold in the marketing area, and at the same time

the purchaser must *not* be a handler. If the definition of Class III-D means only that the purchaser should not be a handler with respect to the plant to which the cream is delivered, the words "not a handler" are meaningless and redundant, because if delivery is made outside of a county having an approved plant, the purchaser could never be a handler as to such delivery since he would not be operating an approved plant in the county in which the delivery is made.[8] An interpretation or construction is not favored which renders meaningless or redundant a provision in the order. *Singer* v. *United States,* 323 U. S. 338; *McDonald* v. *Thompson,* 305 U. S. 263, rehearing denied, 305 U. S. 676; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, and *Irving Trust Co.* v. *Maryland Casualty Company,* 83 F. 2d 168 (C.A. 2), certiorari denied, 299 U. S. 571.

The delivery of cream, in order to warrant the III-D classification, must always be to a purchaser who is not a handler at the plant where the delivery is made because, if the plant is approved by the health authorities for the receiving of milk to be sold in the marketing area, such approval results in the county, in which the plant is located, having an approved plant; and the III-D classification cannot be had on a delivery to a purchaser in a

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[8] See definition of "handler" in the New York Marketing order (R. 83).

county having an approved plant. It was, therefore, to achieve a definite result that the words "not a handler" were included in the Class III-D definition. These words have meaning and significance only if given the obvious meaning that if a purchaser qualifies under the order as a handler by reason of its operations *at any plant*, the cream delivered to such purchaser cannot qualify for Class III-D, on the basis of delivery to a purchaser, even if the cream is delivered to a plant which is not approved by the health authorities and at which the purchaser is not, therefore, a handler. Moreover, the giving of significance and meaning to the phrase "not a handler" is in accord with the basic purpose (R. 140) of giving the III-D classification only to cream sold and delivered to a non-handler for use in the outside markets beyond the supply source for the New York marketing area. Certainly this classification is not to be given to a handler who merely transfers the cream from one of his plants to another of his plants.

The first or tentative interpretation (R. 131) by the Market Administrator as to the meaning of the phrase "not a handler" was issued in December 1938. There is no basis in the record for the petitioner's assertion that the Secretary approved that interpretation of the Market Administrator or that any other official of the United States Department of Agriculture authorized to bind the Secretary

ever approved the interpretation.[8a] The powers and duties of the Market Administrator are specified in the order (R. 84; 7 CFR, 1938 Supp., 927.3), but the order does not authorize the Market Administrator to issue interpretations. The statute provides (7 U. S. C. 608c(7)(C)(ii)) that the Secretary may delegate authority to the Market Administrator to issue rules and regulations, but the order in effect during the period of these handling transactions does not contain that authorization. The Market Administrator is merely to administer the order in accordance with its terms and conditions. It was held in *Queensboro Farm Products* v. *Wickard,* 137 F. 2d 969, 981-982 (C.A. 2), footnote 21, that the Market Administrator is without power to bind the Secretary by the issuance of an interpretation. Acts of a governmental officer in excess of the authority conferred upon him do not bind or estop his superior officers or the United States. *Federal Crop Insurance Corporation* v. *Merrill,* 332 U. S. 380, 383-384; *United States* v. *Stewart,* 311 U. S. 60, 70; *United States* v. *San Francisco,* 310 U. S. 16, 32.

[8a] The only instances in which some other person—and that person had no authority to bind the Secretary—in the United States Department of Agriculture concurred in or approved statements by the Market Administrator were with respect to matters which are not relevant interpretations at all (R. 53-55, and 77) in dealing with the meaning of the phrase "not a handler" in the definition of Class III-D, and it is the interpretation (R. 131) which was paraphrased in the stipulation—on which the petitioner now relies—that has relevance to the meaning of the phrase "not a handler" in the definition of Class III-D.

The interpretation relied on by the petitioner is tantamount to an amendment to the order, and the Market Administrator could not have been empowered to make any such change in the regulatory provisions of the order. The power to amend the order is vested only in the Secretary (7 U. S. C. 608c(17)), and even the Secretary cannot amend the order by merely issuing an interpretation. The amendment to the order must be based on substantial evidence adduced at a public hearing, and the amendment must be approved by at least two-thirds of the producers. The Market Administrator was without authority, and could not have been vested with authority, to issue the interpretation on which the petitioner now relies.

The part of the stipulation, with respect to the shipment of cream by the petitioner to the petitioner, which states that the cream, in this claim, was not delivered to a handler within the meaning of the phrase "not a handler" in the definition of Class III-D, even though the petitioner was a handler at other plants at the time of the delivery of the cream, is not a stipulation of evidentiary facts but a stipulation as to a legal conclusion. The stipulation is not, therefore, binding on the courts. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 41; and *Cloverleaf Dairy Co.* v. *Patterson*, 315 U. S. 148, 151-152. The stipulation embodying the erroneous interpretation by the Market

Administrator attempted, as the court below said (R. 192-193) "to put a gloss upon the Regulation, and the Regulation had the force of law;" and it is the duty of courts "to administer rights and obligations as they exist, not as the parties may choose to substitute others." If petitioner believed that the Judicial Officer acted improperly in his ruling on the stipulation (Pet. 15-16, Br. 28-29), it should have brought this to his attention, by a petition to rehear, reargue, or reconsider his ruling. 7 CFR, 1943 Cum. Supp., 900.68(a)(3).

The petitioner did not conduct its business in reliance on the stipulation or the interpretation. The stipulation was executed in January 1944, and the claims by the petitioner are for the period ending on April 30, 1940. The interpretation by the Market Administrator was issued in December 1938 but on October 20, 1939, the Market Administrator reclassified (R. 63-64) the cream shipments of the petitioner for certain prior months, and demanded payment of $48,575.78, which was paid under protest by the petitioner and for the recovery of which, along with certain other payments, this proceeding was instituted by the petitioner.[9] Subsequently the Market Administrator made other reclassifications for the period ending on April 30,

[9] The order was in suspension (4 F.R. 1259, 2377) during the period January 31, 1939, to July 1, 1939. The tentative interpretation in December 1938—reversed in October 1939—never "seasoned or broadened into a settled administrative practice." *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 156.

1940. The petitioner's method of doing business was determined long before the tentative interpretation was issued by the Market Administrator, and was continued long after the interpretation was expressly reversed by the Market Administrator and even after the petitioner filed (R. 12) its petition under section 8c(15)(A) of the statute. The Market Administrator—not a subordinate, as asserted in the petition for certiorari (p. 15)—reclassified the cream (R. 63-64), and the petitioner paid the money under protest to the Market Administrator (R. 63-64), and not to a subordinate. The order (R. 102) directs the Market Administrator to verify reports and payments by handlers, and to make such reclassifications as will result in computations in accordance with the classification and pricing provisions in the order.

Assuming, *arguendo,* that classification can be had on the basis of "movement from" the second cream plant, as distinguished from mere "utilization" in that plant, the record shows (R. 62-63, 68-72) that the cream in this claim was not delivered from the second plant to a nonhandler purchaser in a county, outside of the State of New York, having no plant approved for receiving milk to be sold in the marketing area. There is therefore no merit in the petitioner's claim for the III-D classification.[10]

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[10] The graphic charts appended to the opinion (R. 196-199) of the Court of Appeals are useful in tracing the various shipments.

III

The interpretation of the Market Administrator and the erroneous legal conclusion in the stipulation are further involved only in (A) under Claims 3 and 4. In this claim the petitioner's milk was delivered to the plant of the Borden Company in Belmont, New York, and was there separated into cream which was shipped to the Borden plant in Newark, New Jersey, and from that "second plant" it was again shipped to another Borden plant in New Jersey (R. 72). Prior to October 1, 1939, when the Newark plant was operated as a Division of the Borden Company, the shipment by the Borden Company to the Borden Company did not constitute a delivery to a purchaser and therefore the cream could not be in Class III-D, even assuming the validity of the interpretation and the stipulation as to the meaning of the phrase "not a handler."

From October 1, 1939, to April 30, 1940, the end of the period involved in this case, the Newark plant was operated by Borden's Farm Products of New Jersey, Inc. (R. 72, 125-126). Since this company received milk from "producers" (R. 73), it was a "handler" (R. 83) and the III-D classification cannot be had because the company, even if considered to be a purchaser, was a handler.

IV

The cream involved in (B) and (C) under Claims 3 and 4 was not delivered to a purchaser,

outside the State of New York, in a county having no plant approved for receiving milk to be sold in the marketing area (R. 75-76). This is so irrespective of whether classification is on the basis of utilization at the second plant or on the basis of movement from the second plant, as contended for by the petitioner. There is, therefore, no necessity for dealing with the interpretation of the phrase "not a handler" in disposing of these claims. No part of the stipulation applicable to these claims was rejected by the courts.

V

Petitioner asserts that there is a conflict between the decision in this case and the decision in *Barron Co-op. Creamery* v. *Wickard*, 140 F. 2d 485, 488 (C.A. 7).[11] Petitioner quotes from the opinion in that case, which involved the Chicago milk marketing order, to the effect that nothing in the Chicago order "required the handler to look beyond his own disposition of the milk" or to "pursue the milk and milk products to see in what use classification they were ultimately disposed of." But the Chicago order (see 140 F. 2d 485, at page 488) did not provide for classification on the basis of utilization at, or movement from, the plant where

[11] The petitioner asserts (Pet. 17) that the decision of the court below is in conflict with several other cases, but no showing of any conflict is made. The cases cited by the petitioner (Br. pp. 25-28; 32-33) deal with issues and legislation totally different in language and purpose from that here involved.

the milk was received from producers, subject to certain exceptions for classification on the basis of utilization at the second plant. The basis of classification under the Chicago milk order is therefore quite different from that of the New York milk order here involved and there clearly is no conflict between the *Barron* decision and that of the court below. Petitioner seeks—instead of denies—the privilege of classification on the basis of utilization at the second plant.

CONCLUSION

The decision of the court below is correct and there is no conflict with the decision of any other court of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
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AUGUST, 1949

APPENDIX

Aricle III of Order No. 27 (7 CFR, 1938 Supp., 927.4), in effect during the time with respect to the handling transactions involved in this case, provides:

"Section 1. *Basis of Classification.* All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association: *Provided,* That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant: *and provided further,* That if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utilization at such second plant.

"Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

* * * * *

"Section 2. *Classes of Utilization.* The classes of utilization of milk shall be as follows:

* * * * *

"2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs (5) and (7) of this section:

* * * * *

"7. Class III-D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese."

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